IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	**CIVIL ACTION**
v.	:	**NO. 96-6130**
OMAR POLANCO	:	**(Criminal No. 92-256-1)**

MEMORANDUM ORDER

Presently before the court is defendant-petitioner's 28 U.S.C. § 2255 petition to vacate, set aside or correct sentence. He asserts that the court "has the discretion to sentence for cocaine instead of 'crack' as they are indistinguishable as a matter of fact," and that his counsel was ineffective for failing to challenge the disparity between sentences for drug offenses involving comparable amounts of cocaine base and powder cocaine or investigating previous challenges to the "100:1 ratio" for crimes involving cocaine base.

Petitioner was a participant in a large scale drug distribution operation in Philadelphia. He pled guilty to distributing cocaine base and conspiring to distribute powder cocaine and cocaine base. The term "crack" was also used in two places in the conspiracy count.

Petitioner was sentenced on September 25, 1992 to a period of incarceration of 188 months pursuant to the applicable guideline range of 188 to 235 months imprisonment.

Petitioner relies on United States v. Davis, 864 F. Supp. 1303 (N.D.Ga. 1994) to argue that there is no rational

basis for imposing greater penalties for cocaine base in relation to those for cocaine. The Court in Davis determined that the penalty provisions in 21 U.S.C. § 841(b)(1) set forth a "scientifically meaningless distinction between cocaine and cocaine base" and that the heightened penalty provision for cocaine base must therefore be ignored. Id. at 1309.

Virtually every other court, however, has rejected constitutional attacks on the federal drug statutes, 21 U.S.C. §§ 841(b)(1) & 846, and guideline provisions, U.S.S.G. § 2D1.1, that treat cocaine base offenses more severely than offenses involving a comparable quantity of cocaine powder. See United States v. McKneely, 69 F.3d 1067 (10th Cir. 1995) (equal protection challenge); United States v. Byse, 28 F.3d 1165 (11th Cir. 1994) (same), cert. denied, 115 S.Ct. 767 (1995); United States v. Coleman, 24 F.3d 37 (9th Cir.) (same), cert. denied, 115 S.Ct. 261 (1994); United States v. Fisher, 22 F.3d 574 (1994) (Eighth Amendment challenge), cert. denied sub nom. Dunkins v. United States, 115 S.Ct. 529 (1994); United States v. Palacio, 4 F.3d 150 (2d Cir. 1993) (due process challenge), cert. denied, 114 S.Ct. 1194 (1994). United States v. Frazier, 981 F.2d 92 (3d Cir. 1992) (distinction between crack cocaine and cocaine powder for sentencing purposes does not constitute equal protection violation and 100:1 ratio does not constitute cruel and unusual punishment), cert. denied sub nom. Frazier v. United States, 507 U.S. 1010 (1993); United States v. Jones, 979 F.2d 317 (3d Cir. 1992) (guideline provisions imposing higher offense levels for

crack cocaine offenses not unconstitutionally vague). Other courts have repudiated Davis. See, e.g., United States v. Flanagan, 87 F.3d 121, 123-24 (5th Cir. 1996); United States v. Jackson, 84 F.3d 1154, 1160 (9th Cir. 1996); United States v. Smith, 73 F.3d 1414, 1417-18 (6th Cir. 1996); United States v. Booker, 70 F.3d 488, 489-91 (7th Cir. 1995), cert. denied, 116 S.Ct. 1334 (1996); United States v. Jackson, 64 F.3d 1213, 1219-20 (8th Cir. 1995), cert. denied, 116 S.Ct. 966 (1996); United States v. Fisher, 58 F.3d 96, 98-100 (4th Cir.), cert. denied, 116 S.Ct. 329 (1995).

Petitioner also argues that a sentencing departure is warranted pursuant to 18 U.S.C. § 3553(b) because the Sentencing Commission failed adequately to weigh the rationality of or to consider the disparate impact of the differentiation between powder cocaine and cocaine base when it formulated the guidelines. Virtually every court which has addressed this issue has rejected such an argument. See United States v. Alton, 60 F.3d 1065, 1070 (3d Cir.) (the impact of the guideline treatment of crack cocaine is not a proper ground for downward departures from the applicable guideline range"), cert. denied, 116 S.Ct. 576 (1995); United States v. Arrington, 73 F.3d 144, 146 (7th Cir. 1996); United States v. Lewis, 40 F.3d 1325, 1345-46 (1st Cir. 1994); United States v. Thompson, 27 F.3d 671, 679 (D.C. Cir.), cert. denied, 115 S.Ct. 650 (1994); United States v. Maxwell, 25 F.3d 1389, 1400-01 (8th Cir.), cert. denied, 115 S.Ct. 610 (1994); United States v. Bynum, 3 F.3d 769, 774-75 (4th

Cir. 1993), cert. denied, 114 S.Ct. 1105 (1994); United States v. Haynes, 985 F.2d 65, 70 (2d Cir. 1993); United States v. Lattimore, 974 F.2d 971, 975-76 (8th Cir. 1992), cert. denied, 113 S.Ct. 1819 (1993).

Petitioner also cites United States v. James, 78 F.3d 851 (3d Cir. 1996) to argue that the record in his case does not support a "crack" sentence. Effective November 1, 1993, the Sentencing Commission amended the Application Notes to § 2D1.1 to include the following definition of cocaine base:

> "Cocaine base," for the purposes of this guideline means "crack." "Crack is the street name for a form of cocaine base, usually prepared by processing cocaine hydrochloride and sodium bicarbonate, and usually appearing in a lumpy, rocklike form.

U.S.S.G. Amendment 487. In James the Court held that the government must prove at sentencing by a preponderance of the evidence that the form of cocaine base defendant sold was crack. See James, 78 F.3d at 858. The defendant in James was sentenced after the 1993 amendments went into effect. See id. at 853 (noting that defendant was arrested in September 1994).

The Sentencing Commission publishes a list of those amendments intended to be effective retroactively. See U.S.S.G. § 1B1.10(d). Amendment 487 is not listed in that section and is not given retroactive effect. See United States v. Camacho, 40 F.3d 349, 353-54 (11th Cir. 1994) (not error to classify substance possessed by defendant as cocaine base although it was not crack thus subjecting defendant to harsher sentence where under law in effect at time of sentencing cocaine base included

all its forms and notwithstanding subsequent guidelines amendment defining cocaine base as crack), cert. denied, 115 S.Ct. 1810 (1995).

Effective assistance of counsel means adequate representation by an attorney of reasonable competence. Government of the Virgin Islands v. Zepp, 748 F.2d 125, 131 (3d Cir. 1984). To show ineffective assistance of counsel, it must appear that a defendant was prejudiced by the performance of counsel which was deficient and unreasonable under prevailing professional standards. Strickland v. Washington, 466 U.S. 668, 686-88 (1984); Government of the Virgin Islands v. Forte, 865 F.2d 59, 6.2 (3d Cir. 1989). Counsel's conduct must have so undermined the proper functioning of the adversarial process that the result of the pertinent proceedings cannot be accepted as reliable, fair and just. Lockhart v. Fretwell, 506 U.S. 364, 369 (1993); Strickland, 466 U.S. at 686; United States v. Nino, 878 F.2d 101, 103 (3d Cir. 1989).

Petitioner's counsel did everything that a competent lawyer reasonably could be expected to do under the circumstances and successfully reduced the amount of drugs attributable to petitioner. The court agrees with the overwhelming amount of authority as to the validity of the penalties for cocaine base offenses and it is beyond doubt that the result of petitioner's sentencing proceeding was fair and would not have been any different had counsel made the arguments petitioner now claims he should have. It would not be reasonable to expect counsel to

have posed a challenge to the applicable cocaine base penalty provisions at a sentencing in September 1992.

It clearly appears from the petition and pertinent records in the case that petitioner is not entitled to be resentenced.

ACCORDINGLY, this day of June, 1997, upon consideration of petitioner's 28 U.S.C § 2255 petition, **IT IS HEREBY ORDERED** that said Motion is **DENIED** and the above action is **DISMISSED**.

BY THE COURT:

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JAY C. WALDMAN, J.